United States Department of Labor
Employees' Compensation Appeals Board

O.W., Appellant	)	
and	)	**Docket No. 09-427**
	)	**Issued: November 19, 2009**
DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 1, 2008 appellant, through counsel, filed a timely appeal of a March 26, 2008 merit decision of the Office of Workers' Compensation Programs granting a schedule award for the left lower extremity and November 7, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case

ISSUES

The issues are: (1) whether appellant has more than eight percent impairment of the left lower extremity, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for a merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 28, 1995 appellant, then a 39-year-old rubber worker, injured his low back when he bent over to lift a T-156 track.[1] The Office accepted the claim for a herniated lumbar disc and authorized surgery for a L4-5 laminectomy and discectomy, which was performed on January 5, 1996.[2] By letter dated December 15, 1997, it placed appellant on the periodic rolls for temporary total disability. Appellant subsequently accepted a limited-duty job offer as a clerk and returned to work on February 20, 2007.[3]

On May 2, 2007 appellant requested a schedule award for impairment to his back and left leg.

In a July 7, 2007 report, Dr. William Rutledge, a treating physician, diagnosed herniated lumbar nucleus pulposus, left leg radiculopathy and lumbar degenerative joint disease. He determined that appellant had a 28 percent whole person impairment of his back with right leg symptoms. Dr. Rutledge noted that appellant had minimal lumbar range of motion with decreased sensation and loss of reflexes in the left leg with significant radicular symptoms.

On October 31, 2007 Dr. Rutledge restated the diagnoses. He reported that appellant had bilateral toes numbness and tingling with lumbar pain radiating into the left leg and gluteal regions. Appellant reached maximum medical improvement as of February 2007. Dr. Rutledge concluded that appellant's lumbar injury caused significant lower extremity sensory and motor impairments. Using Table 17-37, page 552 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fifth edition, he rated appellant as having 42 percent right lower extremity impairment based upon the peroneal nerve motor deficit and 5 percent impairment sensory deficit. Appellant had a 12 percent left lower extremity impairment due to the sciatic nerve sensory impairment and a 5 percent impairment due to sensory deficits of the lateral sural distribution resulting in a total left lower extremity impairment of 17 percent. Using the Combined Values Chart, Dr. Rutledge concluded that appellant had total lower extremity impairment of 56 percent.

On December 14, 2007 Dr. R. Meador, an Office medical adviser, recommended referral of appellant to a physician familiar with the A.M.A., *Guides*. He found that Dr. Rutledge did not provide impairment ratings that conformed to the A.M.A., *Guides*. The October 31, 2007 impairment rating, inappropriately based appellant's impairment rating on the peripheral nerves rather than specific nerve roots while the July 7, 2007 report based impairment on the lumbar spine.

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[1] The Office assigned file number xxxxxx848. The record contains evidence that on May 2, 1986 appellant strained his lower back while in the performance of duty. The Office accepted the claim for a lumbosacral strain and assigned file number xxxxxx321.

[2] Appellant was terminated by the employing establishment effective April 27, 1997 due to inability to perform his work duties.

[3] On May 1, 2007 the Office issued a loss of wage-earning capacity decision based on his actual earnings as a modified clerk.

In a February 14, 2008 report, Dr. Robert Holladay, IV, a second opinion Board-certified orthopedic surgeon, reviewed the medical evidence, statement of accepted facts and physical examination. He found that appellant had an eight percent left lower extremity impairment. Physical examination revealed some motor weakness and decreased sensation in the S-1 nerve distribution. Dr. Holladay used Table 15-18, page 424 to note a maximum impairment of five percent sensory loss of the S-1 nerve. He advised that appellant had a Grade 3 (30 percent) sensory deficit using Table 15-16, page 424. Dr. Holladay then multiplied 30 percent by 5 percent to total 1.5 percent sensory loss, which was rounded up to 2 percent. As to the L-5 nerve root, he noted a maximum of 37 percent for loss of motor strength under Table 15-18. Using Table 15-16 Dr. Holladay classified appellant as Grade 4 (15 percent) motor deficit. He multiplied the 15 percent grade by the 37 percent maximum motor loss to total a 5.55 percent impairment, which he rounded up to 6 percent impairment. Dr. Holladay used the Combined Values Chart to determine if appellant had a total lower extremity impairment of eight percent.

On March 13, 2008 Dr. H. Mobley, an Office medical adviser reviewed Dr. Holladay's report and agreed with his eight percent impairment rating for the left lower extremity.

By decision dated March 26, 2008, the Office granted a schedule award for eight percent impairment to the left lower extremity.

On October 22, 2008 the Office received appellant's request for reconsideration, contending that Dr. Holladay did not conduct a thorough examination. Appellant argued that he had greater impairment. On September 7, 2007 Dr. R. Paul Tucker, a treating physician, diagnosed low back pain and pain in the left foot and ankle. A February 26, 2002 progress note from Dr. Yeshwar P. Reddy, an attending Board-certified physiatrist, diagnosed cervical radiculopathy and bilateral L-4 radiculopathy with advanced degenerative changes at L4-5, L3-4 and L5-S1. Notes dated November 16, 2006 and January 4, 2007 from Dr. C.C. Alkire, a treating physician, regarded the upper extremity and back pain. An April 21, 2005 magnetic resonance imaging (MRI) scans of the cervical spine; and a medication flow sheet for appellant.

By decision dated November 7, 2008, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body.[6] However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants,

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *See Carol A. Smart*, 57 ECAB 340 (2006). (Section 8107 of the Act authorizes the payment of schedule awards for the loss or loss of use, of specified members or functions of the body. Such loss or loss of use is known as permanent impairment).

good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[7]

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[8] As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award.[9] However, as the Act makes provision for the lower extremities, a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.[10]

The fifth edition of the A.M.A., *Guides* describes a method to be used for evaluation of impairment due to sensory loss of the extremities. The nerves involved are to be first identified. Under Tables 15-15 the extent of any sensory loss due to nerve impairment is to be determined, to be followed by determination of the maximum impairment due to nerve dysfunction applying Table 15-18 for the lower extremity. The severity of the sensory deficit is to be multiplied by the maximum value of the relevant nerve.[11]

ANALYSIS -- ISSUE 1

On appeal, appellant contends that he has more than eight percent permanent impairment of the left lower extremity. The Office accepted his claim for a herniated lumbar disc and authorized surgery for a L4-5 laminectomy and discectomy, which was performed on January 5, 1996.

Appellant submitted impairment ratings dated July 7 and October 31, 2007 from Dr. Rutledge, who diagnosed herniated lumbar nucleus pulposus, left leg radiculopathy and lumbar degenerative joint disease. On July 7, 2007 Dr. Rutledge rated 28 percent impairment to the whole person for Diagnosis-Related Estimate Lumbar Category V, based on Table 15-3 at page 384 of Chapter 15 of the fifth edition of the A.M.A., *Guides*. His impairment rating for appellant was based on impairment of the whole person to the lumbar spine. Under the Act, a schedule award is not payable for the loss or loss of use of any member of the body or function that is not specifically identified in section 8107 of the Act or its implementing regulations.[12] The spine or back is specifically excluded from coverage of the schedule award provisions of the

[7] *See id.*; *P.C.*, 58 ECAB ___ (Docket No. 07-410, issued May 31, 2007); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[8] *W.C.*, 59 ECAB ___ (Docket No. 07-2257, issued March 5, 2008); *Anna V. Burke*, 57 ECAB 521 (2006).

[9] *D.N.*, 59 ECAB ___ (Docket No. 07-1940, issued June 17, 2008).

[10] *J.Q.*, 59 ECAB ___ (Docket No. 06-2152, issued March 5, 2008).

[11] A.M.A., *Guides* 423

[12] *See Leroy M. Terska*, 53 ECAB 247 (2001).

Act.[13] Although a schedule award may not be issued for an impairment to the spine, an award may be payable for permanent impairment of the lower extremities that is due to an employment-related back condition.[14] The table relied upon by Dr. Rutledge provides for an impairment based on the whole person. However, the Act does not provide for a schedule award based on permanent impairment of the whole person.[15] Therefore, Dr. Rutledge's July 7, 2007 impairment rating is not based on the protocols adopted by the Office pertaining to the back or spine. It is insufficient to determine whether appellant has any impairment of his lower extremities causally related to his accepted lumbar spine conditions.[16]

In an October 31, 2007 report, Dr. Rutledge opined that appellant's lumbar injury caused significant lower extremity sensory and motor impairments. Citing Table 17-37, page 552 he concluded that appellant had a 42 percent right lower extremity impairment based upon the peroneal nerve motor deficit and 5 percent impairment for a sensory deficit. Dr. Rutledge noted 12 percent left lower extremity impairment due to the sciatic nerve sensory impairment and a 5 percent impairment due to sensory deficits of the lateral sural distribution resulting in a total left lower extremity impairment of 17 percent. Using the Combined Values Chart, he concluded that appellant had total bilateral lower extremity impairment of 56 percent. While Dr. Rutledge generally referenced Table 17-37, page 552 of the A.M.A., which is used for rating impairments for peripheral nerve deficits, his report fails to identify any specific nerve causing motor or sensory deficit due to the accepted conditions. The report offered no basis on which to rate impairment under the A.M.A., *Guides*.[17]

In contrast, Dr. Holladay, the second opinion physician, provided an impairment rating based on a proper application of the A.M.A., *Guides.* The Office properly relied on Dr. Holladay's findings as the basis for the March 26, 2008 schedule award. Dr. Rutherford applied Tables 15-15, 15-16 and 15-18 of the A.M.A., *Guides* to note motor and sensory loss. A maximum of five percent impairment is provided for sensory deficit or pain in the distribution of the S-1 spinal nerve root under Table 15-18 of the A.M.A., *Guides*.[18] Dr. Holladay advised that appellant was classified as Grade 3 of (30 percent) sensory deficit under Table 15-15.[19] Impairment due to sensory loss was calculated as 2 percent impairment for the left lower extremity or leg by multiplying the 30 percent grade with the 5 percent maximum allowed for the S-1 nerve. They calculated that appellant had a 37 percent impairment of the left leg for loss of

[13] 5 U.S.C. § 8101(19); *see also Vanessa Young*, 55 ECAB 575 (2004).

[14] *Vanessa Young*, *supra* note 13; *Gordon G. McNeill*, 42 ECAB 140 (1990).

[15] *Tania R. Keka*, 55 ECAB 354 (2004); *Guiseppe Aversa*, 55 ECAB 164 (2003).

[16] *Guiseppe Aversa*, *supra* note 15 (the Board found that a physician improperly used Chapter 15 in evaluating lower extremity impairment caused by a spinal injury).

[17] Before the A.M.A., *Guides* can be utilized, the claimant's physician most provide a description of impairment including loss in degrees of range of motion and the decrease in strength or disturbance of sensation. *See Peter C. Bilkind*, 55 ECAB 580 (2005).

[18] Table 15-18, page 424.

[19] Table 15-15, page 424.

strength in the distribution of the L-5 spinal nerve root under Table 15-18 of the A.M.A., *Guides*. Both Dr. Holladay and the Office medical adviser further calculated that he had a maximum power and motor deficit of 15 percent of the left leg, a Grade 4 pain in the distribution of the L-5 spinal nerve root under Table 15-16.[20] He calculated 6 percent impairment for the left lower extremity or leg due to power and motor deficits when multiplying the 15 percent grade by the 37 percent maximum allowed for the L-5 nerve. Dr. Holladay and the medical adviser properly utilized the Combined Values Chart of the A.M.A., *Guides* in reaching an impairment rating of eight percent for the left lower extremity. This evaluation conforms to the A.M.A., *Guides* and establishes that appellant has no more than an eight percent impairment of the left lower extremity.

The impairment ratings provided by Dr. Holladay and the Office medical adviser conform to the A.M.A., *Guides* and their respective findings constitutes the weight of the medical evidence.[21] Appellant has not submitted any probative medical evidence indicating that he has greater than an eight percent impairment of the left lower extremity. The report of Dr. Rutledge is not of sufficient probative value to create a conflict for the reasons noted above.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[22] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[23] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[24] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.[25]

ANALYSIS -- ISSUE 2

Appellant's October 22, 2008 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. He generally alleged that Dr. Holladay's report was deficient. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required

[20] Table 15-16, page 424.

[21] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

[22] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[23] 20 C.F.R. § 10.606(b)(1)-(2). *See C.N.*, 60 ECAB ___ (Docket No. 08-1569, issued December 9, 2008).

[24] *Id*. at § 10.607(a). *See A.F.*, 59 ECAB ___ (Docket No. 08-977, issued September 12, 2008).

[25] *R.M.*, 59 ECAB ___ (Docket No. 08-734, issued September 5, 2008).

where the legal contention does not have a reasonable color of validity.[26] Because appellant did not provide any support for his allegation regarding the deficiencies of Dr. Holladay's examination, the Board finds that these arguments do not have reasonable color of validity.[27] Additionally, he did not advance a relevant legal argument not previously considered by the Office. Therefore, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[28]

Appellant also failed to satisfy the third requirement under section 10.606(b)(2). He did not submit any relevant and pertinent new evidence with his undated request which was received by the Office on October 22, 2008. Dr. Rutledge's October 31, 2008 impairment rating was already part of the record and considered by the Office. As such, this evidence does not constitute relevant and pertinent new evidence not previously considered by the Office.[29]

Appellant also submitted a September 7, 2007 progress note from Dr. Tucker, a treating physician, who diagnosed low back pain and pain in the left foot and ankle; a February 26, 2002 progress note from Dr. Reddy, an attending Board-certified physiatrist, diagnosing cervical radiculopathy and bilateral L-4 radiculopathy with advanced degenerative changes at L4-5, L3-4 and L5-S1; progress notes for November 16, 2006 and January 4, 2007 from Dr. Alkire, a treating physician, regarding upper extremity and back pain; an April 21, 2005 MRI scan of the cervical spine; and a medication flow sheet for appellant. However, the submission of these reports does not require reopening of appellant's claim for merit review because they are not relevant to the main issues of the present case, which is whether he has established that he has more than an eight percent impairment of his left lower extremity.[30] None of this evidence provides an impairment rating for appellant's lower extremities and, thus is irrelevant to the issue in question.[31]

Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[32] As he was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied the October 22, 2008 request for reconsideration.

[26] *M.E.*, 58 ECAB ___ (Docket 07-1189, issued September 20, 2007).

[27] *See Jennifer A. Guillary*, 57 ECAB 485 (2006).

[28] 20 C.F.R. § 10.606(b)(2)(i) and (ii).

[29] Submitting additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim. *R.M.*, 59 ECAB ___ (Docket No. 08-734, issued September 5, 2008); *James W. Scott*, 55 ECAB 606 (2004).

[30] *M.E.*, 58 ECAB ___ (Docket No. 07-1189, issued September 20, 2007).

[31] Submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. *Patricia G. Aiken*, 57 ECAB 441 (2006).

[32] 20 C.F.R. § 10.606(b)(2)(i)-(iii).

CONCLUSION

The Board finds that appellant has no more than an eight percent impairment of the left lower extremity, for which he received a schedule award. The Board further finds that the Office properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 7 and March 26, 2008 are affirmed.

Issued: November 19, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board